

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREVOR BURNS,

Plaintiff,

-against-

SARAH HINES, Assistant District Attorney;
UNKNOWN N.Y.C. DEPT. OF
CORRECTION OFFICIAL,

Defendants.

1:21-CV-8236 (LTS)

ORDER

LAURA TAYLOR SWAIN, Chief United States District Judge:

Plaintiff, who is currently incarcerated, filed this action *pro se* and sought to proceed *in forma pauperis* (IFP). On October 15, 2021, the Court: (1) noted that while Plaintiff has been a prisoner, he has filed three or more federal civil actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim on which relief may be granted, and (2) ordered Plaintiff, within 30 days, to show cause by declaration why he is not barred under 28 U.S.C. § 1915(g) from proceeding with this action IFP.

On November 4, 2021, the court received a letter from Plaintiff in which he conceded that he could not show good cause as to why he is not barred under Section 1915(g), and stated that he will file another new federal civil action in which he would pay the fees to bring that new action. (ECF 5.)

By order and judgement dated November 9, 2021, and entered and mailed the next day, the Court, with the understanding that it had not received any declaration or fees from Plaintiff, and that he had conceded that he was barred under Section 1915(g), denied Plaintiff's request to proceed IFP and dismissed this action without prejudice. (ECF 6 & 7.) In doing so, the Court

recognized Plaintiff as barred under Section 1915(g) from proceeding IFP in a federal civil action as a prisoner. (ECF 6.)

On November 10, 2021 – the date that the Court’s November 9, 2021 order and judgment were entered and mailed – the court received from Plaintiff payment of \$402 in fees to bring a federal civil action. Two days later, on November 12, 2021, the Clerk of Court entered Plaintiff’s declaration, which Plaintiff had filed in response to the Court’s October 15, 2021 order. (ECF 8.)

In his declaration, Plaintiff concedes that he cannot allege facts to satisfy the statutory exception to the Section 1915(g) filing bar. (*Id.*) He also states that he submitted \$402 in fees with his declaration, and that he is withdrawing this action as well as filing a new complaint that he attached to his declaration. (*Id.*)

Because the Section 1915(g) filing bar against Plaintiff took effect when his third strike was entered, not when this Court recognized him as barred, *see Coleman v. Tollefson*, 575 U.S. 532, 537-39 (2015), and because nothing in Plaintiff’s declaration suggests that the Court’s dismissal of this action should be vacated, Plaintiff remains barred under Section 1915(g) from bringing this action. In light of Plaintiff’s *pro se* and incarcerated statuses, and his clear intent to file a new federal civil action and submit payment of the fees to bring that new action, however, the Court directs the Clerk of Court to open the complaint that is attached to Plaintiff’s declaration (ECF 8, at 3-71) as a new civil action, and to apply the fees Plaintiff has paid to that new civil action.

CONCLUSION

The Court directs the Clerk of Court to open the complaint that is attached to Plaintiff’s declaration (ECF 8, at 3-71) as a new civil action, and to apply the fees Plaintiff has paid to that new civil action. The filing date for Plaintiff’s complaint in the new civil action is November 8, 2021.

The Court also directs the Clerk of Court to docket a copy of this order in the new civil action.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore IFP status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

The Court further directs the Clerk of Court to mail a copy of this order to Plaintiff and note service on the docket.

SO ORDERED.

Dated: November 15, 2021
New York, New York

/s/ Laura Taylor Swain

LAURA TAYLOR SWAIN
Chief United States District Judge